TESTIMONY OF
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RAISED BILL 6532

Senator McDonald, Representative Lawlor, Members of the Committee: My name is Tom Merrill. I am a Professor of Law at Yale Law School. Before joining the Yale faculty last year I taught at Columbia Law School. I teach and write in the fields of property, administrative law, and constitutional law. Among other subjects, I have written articles on statutes of limitations and retroactive legislation. I have been retained by Saint Francis Hospital and Medical Center in Hartford to address certain legal issues raised by Raised Bill 6532.

Raised Bill 6532 is intended to amend Conn. Gen. Stat. § 52-577d. General Statutes § 52-577d prescribes a special statute of limitations for civil actions to recover damages for sexual abuse, exploitation, or assault against a minor. It provides an unusually long statute of limitations of 30 years from the date the plaintiff obtains the age of majority. In other words, potential plaintiffs can wait until they reach the age of 48 to sue for abuse that occurred when they were a minor. Raised Bill 6532 would amend this already-lengthy statute of limitations in two significant ways.

First, it would tack on an additional period of three years in the event that "material evidence is discovered" after they reach the age of 48, provided this new evidence could not have been previously discovered in the exercise of reasonable care. This is different from the typical "discovery rule" that extends the statute of limitations when the plaintiff could not discover the *injury* or the *identity* of the defendant through

the exercise of reasonable care during the statutory time period. Here, the special discovery rule applies only to the discovery of *material evidence.*

Second, Raised Bill 6532 makes the new, extended statute of limitations retroactive, in that it applies to "any cause of action arising from an act or omission occurring prior to, on or after" the date of passage of the proposed amendment. This too is unusual, although the current version of Conn. Gen Stat. § 52-577d was extended from 17 years to 30 years after majority in 1991 in an amendment that was also made explicitly retroactive. This practice of adopting retroactive extensions of the statute of limitations is problematic for several reasons, as I discuss below.

In this testimony I will address four topics. I will begin by reviewing why we have statutes of limitations. I will then offer some evidence from existing practice which suggests that the proposed Raised Bill 6532 would establish a limitations period that is out of line with the balance the Legislature has struck in other areas, and out of line with the judgment that other legislative bodies have reached about the proper statute of limitations for sexual abuse of minors. Next I will offer some thoughts about why retroactive amendments to statutes of limitations should be avoided by legislatures if at all possible. Finally, I will conclude with a brief consideration of the risk of constitutional challenges to the proposed amendment, especially its retroactive feature.

I. WHY WE HAVE STATUTES OF LIMITATIONS

Statutes of limitations have been around for nearly as long as legal systems have existed. The reasons for such laws are well known, and are usually divided into three headings.

The first reason is the desirability of achieving repose or peace of mind on the part of potential litigants. Uncertainty about whether litigation will be commenced can be highly unsettling. It can also affect behavior in many ways. Relevant evidence must be preserved, and potential witnesses must be kept in contact. Adequate financial reserves must be retained to fund potential litigation. Investments may have to be deferred if they would be hard to liquidate to satisfy a future judgment. Probably the most important reason why statutes of limitations are fixed in terms of a precise numbers of years rather stated in terms of a general standard (such as an admonition to file within a "reasonable time") is to cut off this uncertainty at some point. As the Connecticut Supreme Court has recognized, "even if one has a just claim it is not unjust to put the adversary on notice to defend within the period of limitation" because "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *State v. Skakel*, 276 Conn. 633, 682-83 (2006), quoting *United States v. Marion*, 404 U.S. 307, 322-23 n.14 (1971).

The second reason for statutes of limitations is to avoid potential unfairness to defendants. As time passes, evidence that might support defenses to a charge disappears or is lost to the memory of witnesses. A vivid example is provided by a recent New Jersey case, *Bernoskie v. Zarinsky*, 890 A.2d 1013 (Sup. Ct. N.J. 2006), where a wrongful death action was brought against a defendant for a murder committed 40 years earlier. Virtually every witness the defendant might have called to contradict the testimony of the person who had recently come forward to name him as the perpetrator was dead. (The court held the action was barred notwithstanding the discovery of new evidence.)

Individual perpetrators like the defendant in *Bernoskie* at least have the benefit of a kind of natural statute of repose in that future actions against them are abated when they die. Institutions, which have a potentially indefinite life span, are in this respect more vulnerable to long delays in litigation. Institutional defendants are also likely to experience extensive turnover of personnel over any significant period of time, making identification and location of the relevant witnesses even more difficult than in the case of individual defendants, who can at least testify on their own behalf.

It might be thought that the risk of lost evidence is symmetric, in that dying witnesses, lost evidence and fading memories will generally afflict plaintiffs and defendants alike. This is true for the total universe of all possible plaintiffs and defendants. In practice, however, the risk will be asymmetric. This is because the plaintiffs who choose to sue only after significant time has passed will not be a random selection of plaintiffs. They will consist disproportionately of plaintiffs who have benefitted from some newly discovered evidence or a new legal ruling that makes their claim stronger than it was initially. Defendants in such actions, in contrast, will likely be randomly distributed in terms of the quality evidence that remains available to them. Because of the passage of time, the quality of that evidence will likely be significantly deteriorated. The trial of old claims therefore raises the serious prospect of asymmetric unfairness to defendants.

The third reason is to avoid imposing undue burdens on the judicial system. The more time that elapses between an alleged wrong and a trial seeking to redress that wrong, the more difficult it will be to obtain jurisdiction over the relevant parties (people move), the more difficult it will be to locate and compel the testimony of witnesses

(primary witnesses may die, move, or disappear, requiring searches for secondary witnesses), the quality of witness testimony will deteriorate (memories fade), and the more difficult it will be to find and compel the production of documents (originals get lost or destroyed). As a rule, the longer the lapse of time, the more complicated the proof will be, on both sides. This means more difficult and time-consuming discovery processes, more evidentiary disputes and rulings, longer and more complicated trials, greater difficulty in comprehending the issues on the part of the fact-finder, and more erroneous or disputable results, generating more appeals.

Courts have crowded dockets with many issues pressing for their attention. The statute of limitations reflects a reasonable principle for allocating scarce judicial resources. Older claims, which typically consume more judicial resources, are cut off, thereby leaving more judicial resources for newer claims, which can be processed more easily. Society benefits by obtaining more dispute resolution from any given level of judicial resources.

II. THE NEED FOR BALANCE

The foregoing rationales for having a statute of limitations, of course, are only part of the picture. It is also important to provide avenues for redress of wrongs, whether it be murder, assault, selling defective products, committing medical malpractice, abuse of minors, or any other type of social harm. Sufficient time must be allowed for potential claimants to gather evidence and consult with attorneys to determine whether to bring an action. Excessively short statutes of limitations would interfere with these objectives, just as an overly-long limitations period would disserve the policies previously considered that support having a statute of limitations.

A number of factors must be balanced in determining the period of time to allow potential claimants to decide whether to prosecute a crime or bring a civil action. One clearly is the nature of the wrong. As far as I am aware, no State today has a statute of limitations for criminal prosecution for murder. This obviously reflects the seriousness of the crime, as well as the fact that public authorities control prosecutions and can be expected to decline to bring cases where evidence is badly deteriorated and the defendant would be prejudiced in mounting a defense. In contrast, the statute of limitations for ordinary civil damages actions in tort is typically quite short, usually two or three years.

Another factor is the difficulty of discovering that a wrong has been committed. Contract actions typically have longer statutes of limitations than do tort actions, perhaps because it is often more difficult to determine whether someone has failed to perform a promise than to identify a tort. Actions to recover possession of real property typically have even longer limits, again because it may be difficult to detect encroachments on real property, particularly if the land is remotely located. Asbestos cases and similar actions involving long latency periods before injuries manifest themselves may justify longer statutes of limitations, or at the least a tolling of the statute of limitations until the injury is discovered.

For the most part, Connecticut has adopted relatively short statutes of limitations for civil actions, in the interest of encouraging prompt resolution of disputes. For example, Connecticut has a three-year statute of limitations for actions in tort unless otherwise specified, Conn. Gen. Stat. § 52-577; a two-year statute of limitations for actions based on negligence, recklessness, or medical malpractice from discovery of the harm (three years maximum from the date the action complained of occurs), Conn. Gen.

Stat. § 52-584; a two-year statute of limitations for exposure to hazardous chemicals (subject to a discovery rule), Conn. Gen. Stat. § 52-577c; a three-year statute of limitations for racial harassment claims, Conn. Gen. Stat. § 52-571c; a three-year statute of limitations for products liability claims, Conn. Gen. Stat. § 52-577a; a five year statute of limitations for wrongful death claims, Conn. Gen. Stat. § 52-555; a six-year statute of limitations for breach of contract, Conn. Gen. Stat. § 52-576; a seven-year statute of limitations for claims against architects, engineers, and land surveyors, Conn. Gen. Stat. § 52-584a; and a 15-year statute of limitations to recover possession of land, Conn. Gen. Stat. § 52-575.

In contrast to these relatively short statutes of limitations for most civil actions, the statute of limitations for damages to a minor caused by sexual abuse – 30 years after majority is reached – stands out as unusually long. To be sure, the Legislature had evidence before it in 1991 about the impediments that minors face in bringing such claims before they reach the age of majority, especially if the abuser is a trusted adult. And there was testimony that some minors may not recognize or understand the damage they have sustained until some time after they have reached adulthood. *See Roberts v. Caton*, 224 Conn. 483, 494 n. 8 (1993). Some adjustment to the ordinary tort statute of limitations to account for these factors is appropriate.

Still, allowing 30 years for abuse suits after the victim has reached the age of majority seems disproportionate to the judgments reflected in other areas. For example, any one over the age of 18 when they were sexually abused would have to bring an action within three years of the act of abuse under the general tort statute of limitations, Conn. Gen. Stat. § 52-577. And representatives of a minor who was killed by an adult would

have to bring a wrongful death action within five years of the act that caused the death (or two years from the date of death), unless the defendant was convicted of homicide or found innocent of homicide by reason of insanity, Conn. Gen. Stat. § 52-555. Although some differentiation among these cases is understandable, it is difficult to see why sexual abuse of a minor warrants 30 years after majority while abuse of an adult warrants three years, or why sexual abuse warrants 30 years when wrongful death warrants five.

The Connecticut limitations period for suits based on abuse of a minor is also out of line with the statutes of limitations that have been adopted by other States in recent years to deal with the problem of abuse of minors. If we consider Connecticut's nearest neighbors, for example, we find that all have enacted special statutes of limitations dealing with abuse of minors. New York requires that suit be brought within seven years of the act complained of; Rhode Island requires that suit be brought within seven years of majority; Massachusetts requires that suit be brought within three years of majority; New Hampshire requires that suit be brought within two years of majority or three years from discovery of the act complained of; Vermont requires that suit be brought within six years of majority or discovery of the act complained of. These statutes suggest that neighboring States have reached a consensus that some type of postponement of the statute of limitations is appropriate, most typically by tolling the statute until the minor reaches majority. But no other State has adopted anything approaching Connecticut's 30 year limitations period after a minor reaches the age of majority.

Finally, the history of the Connecticut statute of limitations for actions based on abuse of a minor is instructive. The special limitations period for abuse of minor claims was originally adopted in 1986. It provided for a limitations period of two years from the

date of majority, but in no event more than seven years from the act complained of. P.A. 86-401, § 6, eff. June 9, 1986, as corrected by P.A. 86-403, § 104, eff. June 11, 1986. This provision was amended in 1991 to dramatically expand the limitations period from two to 17 years from the date of majority, again with an absolute cutoff of seven years from the act complained of. P.A. 91-240. The provision was amended again in 2002, this time by nearly doubling the limitations period from 17 to 30 years from the date of majority, and by deleting the cutoff of seven years from the act complained of. P.A. 02-138, § 2, eff. May 23, 2002. The 2002 amendment also provided that the extension from 17 to 30 years applied retroactively to incidents committed prior to the effective date of the amending Act.

Now, it is proposed to extend the limitations period yet again, by allowing suits at any time within three years of the discovery of material evidence, again with a provision for retroactive application. Given that the statute of limitations is already extraordinarily long, it is not clear why this additional extension of the statute is warranted, other than to affect the pending litigation against Saint Francis Hospital relating to Dr. Reardon. Amending the statute of limitations in order to affect pending litigation is not, as I am sure the committee recognizes, a legitimate basis for legislative action.

III. THE DANGER OF RETROACTIVE STATUTES OF LIMITATIONS

One feature of Raised Bill 6532 warrants special comment, which is that it is expressly made applicable to "any cause of action arising from an act or omission occurring *prior to,* on or after" the date of passage of the proposed amendment. Putting aside the question whether this is constitutional, making extensions of statutes of limitations retroactive presents serious public policy concerns. Three considerations support this conclusion.

First, retroactive extensions of statutes of limitations defeat some of the very purposes of having a statute of limitations. Consider the policy of repose. Statutes of limitations are supposed to eliminate, on a date certain, the uncertainty about the prospect of litigation over past events. If a State adopts a policy of extending statutes of limitations retroactively, the statute of limitations becomes largely worthless as a source of repose. No defendant will ever know for sure that the cloud of litigation has been lifted, because the legislature will have announced its willingness, at least in some circumstances, to extend statutes of limitations retroactively. If the legislature is willing to extend some limitations statutes retroactively, why not others? Insurance based on claims made may become more difficult to obtain in a State that adopts such a policy, or may not be available at all if insurance companies become wary of their ability to calculate the level of risk they face in such a State because of the potential for retroactive liability for past events.

Consider too the concern about burdening the judicial system with cases based on outdated evidence. One purpose of the statute of limitations is to provide clear signals to potential litigants about how long they need to preserve evidence, either to substantiate a

claim or defend against it. Every taxpayer, for example, is familiar with advice to keep all income tax records for three years after the tax filing date (and more limited records thereafter), which is predicated on the statute of limitations. If a State adopts a policy of making retroactive extensions of statutes of limitations, then these signals about appropriate record keeping are blurred. In the short run, cases may be filed in which critical evidence has been destroyed, because parties mistakenly relied on the statute of limitations in structuring their record-keeping activities. This would create an unfair situation for defendants and would increase the burden on courts in attempting to adjudicate these cases. In the long run, as the policy of retroactive extensions becomes known, potential litigants would never throw away any potentially relevant records.

Second, retroactive extensions of statutes of limitations raise serious concerns that the legislature is seeking to affect the outcome of particular cases. This is a concern with any retroactive legislation, and is often cited as a reason why retroactive laws are disfavored. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 (1994). But it is a matter of particular concern where retroactive extensions of statutes of limitations are at issue. In this context, it is likely that specific cases have already been identified that would be affected by the law: those in which particular types of claims have arisen which are barred (or likely to be barred) by the existing statute of limitations. The legislative act of retroactively extending the statute of limitations breathes new life into these particular cases. Both the appearance and the reality suggest that the legislature is tipping the scales of justice to favor one party to these cases at the expense of the other.

Legislative intervention that appears to favor particular litigants is highly corrosive of separation of powers. A legislature's assigned role is to prescribe general

rules for the governance of society, not to decide particular controversies that have arisen under existing law.

Third, it is not in the Legislature's own interest to embrace a practice that allows particular parties or interest groups to think that they may be able to secure legislation that retroactively changes the rules in their favor. This will only encourage other interests or groups to seek to intervene to obtain comparable or offsetting advantages. The Legislature would soon be beset with a clamor from all sides for targeted rule changes that would tilt the litigation playing field in one direction or another.

IV. CONSTITUTIONAL CONSIDERATIONS

I will not attempt to provide a comprehensive analysis of the constitutional issues that might arise in litigation if the legislature adopts Raised Bill 6532. It is virtually certain that constitutional challenges would be mounted, and I believe their result is uncertain.

Two Connecticut appellate courts have adjudicated constitutional challenges to previous expansions of the statute of limitations set forth in Conn. Gen. Stat. § 52-577d. In *Roberts v. Caton*, 224 Conn. 483 (1993), the Connecticut Supreme Court held that the 1991 amendments to Conn. Gen. Stat. § 52-577d, which extended the statute of limitations from two to 17 years, could be constitutionally applied to events that occurred before the new statute was passed. In *Giordano v. Giordano*, 39 Conn. App. 183 (1995), the Connecticut Appellate Court held that the age of majority plus 17 years statute of limitations adopted in 1991 did not violate equal protection or due process by imposing an unduly long statute of limitations on accused child abusers.

Critical to both courts' conclusions was the premise that statutes of limitations are "procedural" rather than "substantive" in nature, and that newly adopted procedural provisions generally apply to pending litigation. *Roberts*, *supra*, at 488; *Giordano*, *supra* at 194. This is a highly debatable premise. For many purposes, statutes of limitations have been classified as substantive in nature rather than procedural. In the context of the *Erie* doctrine, for example, the Supreme Court has long held that statutes of limitations are "substantive" not "procedural." *See Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

Moreover, the method of deciding whether retroactive legislation is permissible based on categorizing laws as either "substantive" or "procedural" is increasingly regarded as outmoded. In its most recent pronouncement on the subject of retroactive statutes of limitations, the Connecticut Supreme Court acknowledged that the distinction "tends to obscure rather than clarify the law." *State v. Skakel*, 276 Conn. 633, 686 n.47 (2006), quoting *State v. Hodgson*, 740 P.2d 848 (Wash. 1987). A more helpful approach, the Court suggested, would "consider the issue in more fundamental terms" by asking what statutes of limitations are and how they function. *Id.*

This potential reorientation of analysis is further confirmed by an important decision of the U.S. Supreme Court subsequent to the Connecticut Supreme Court's ruling in *Roberts*. In *Stogner v. California*, 539 U.S. 607 (2003), the Court held that California's adoption of a new and longer statute of limitations for child abuse cases, which was then applied retroactively to a case in which the prior statute of limitations had expired, violated the Ex Post Facto Clause. The Court's analysis did not advert to the "substance" versus "procedure" distinction. Instead, it asked whether the imposition of punishment for action that was previously shielded by the passage of the statute of

limitations was "manifestly unjust and oppressive" in the way Ex Post Facto laws have historically been regarded. *Id.* at 611. After carefully considering the purposes served by the statute of limitations, the Court, speaking through Justice Breyer, answered in the affirmative. Although the Ex Post Facto Clause applies to criminal cases, not civil cases, the Court's analysis of the fundamental unfairness of retroactive extensions of statutes of limitations would appear to be equally applicable to retroactive extensions of civil statutes of limitations.

I do not suggest that these developments mean that a statute of limitations that retroactively revives civil actions barred by the existing statute of limitations would necessarily be held unconstitutional under either Connecticut or federal constitutional law. I do believe that the constitutionality of such a measure is not resolved by *Roberts* and *Giordano*, and that litigation challenging such legislation would be virtually inevitable. This provides an additional reason to decline to adopt such a statute.

I thank the committee for the opportunity to address these matters.